of the Ardmore Police. He was put in Captain Shaffer's car and asked where he lived and where he stayed the night before. He gave his residence as Media, Pennsylvania. He had established this residence, a room in the house of his fiancee's mother, about four months prior to the murder.† The police took him, in handcuffs, about ten miles to Media, where they arrived about one-half hour after his arrest. Without a warrant, they searched his room and found clothing, and other articles, except socks, which Whiting was wearing or had with him the night before. The shoes Whiting was wearing at this time were apparently the same shoes he had worn the previous night and they were taken from him at this time.

The clothing was spotted with blood. No objection was made by Whiting to the search of the room. A few hours after Whiting was taken away for questioning, the police returned to his room accompanied by his fiancee, Hazel Smith, who had shared the room with Whiting and who had also been arrested. They asked her to search for his socks. She found them and they were used as evidence at the trial. This evidence was introduced at the trial, and admitted without objection (N.T. 193). No objection was made in post-trial motions or on direct appeal to the Pennsylvania Supreme Court.

The United States District Court for the Middle District of Pennsylvania, in an Opinion by the Honorable Michael H. Sheridan, dated June 30, 1965, found the search and seizure to be unreasonable, prejudicial and in violation of Charles Edward Whiting's Constitutional Rights.

An appeal was taken by the Commonwealth to the United States Court of Appeals for the Third Circuit, and that Court affirmed the lower court decision, on March 3, 1966.

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† The Lower Court Opinion says "four weeks" (p. 7, line 21). Petitioner testified it was about "four months" (N.H. 19). Hazel Smith testified at the trial: "He started living at my mother's home steady about three weeks prior to June 14th." (N.T. 464).

REASONS FOR GRANTING THE WRIT

I.

This Case Clearly Presents the Question of the State's Right to Insist on Compliance with Its Procedural Rules

As noted in the *Statement of the Case*, no objection was made at trial in 1956 to the introduction of the blood stained clothing into evidence (N.T. 193).

This question was recently presented to this Court in *Henry v. Mississippi*, 379 U.S. 443 (1965), which also involved the matter of search and seizure. There the Court said, at page 447-449 (emphasis supplied):

> "These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights *unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.* In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not to be permitted to bar vindication of important federal rights. *The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest.* By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided."

We are confronted with the same rule of contemporaneous objection as in the *Henry* case. However, there an objection was made in the form of a motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. In the

Whiting case there was *no objection made at trial, in post-trial motions, or on direct appeal.*

Because of the procedural situation in the *Henry* case, this Court said, at page 449:

> "In these circumstances, the delay until the close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case."

The question then arose whether the decision of defense counsel not to make contemporaneous objection was for purposes of strategy and, therefore, whether there was a "waiver" of federal constitutional rights.

II.

Henry v. Mississippi Leaves Unanswered Many Questions Concerning "Waiver" of Constitutional Rights

The factual situation faced by the Court in *Henry v. Mississippi* necessarily led to the question of whether there was a "waiver" by counsel for strategic purposes. "Waiver" has been defined, under certain circumstances, as "a voluntary relinquishment of a known right". Neither Whiting nor his attorney could have "known" of the right to object in 1965 to the evidence, except by way of anticipation of *Mapp v. Ohio.* The question remains, however, whether Whiting lost his rights by inaction, or, conversely, whether the Commonwealth of Pennsylvania may insist on compliance with its procedural rule.

Here, in effect, we have the situation where Whiting says that the police should have anticipated *Mapp v. Ohio* and secured a search warrant, whereas he and his attorney should be excused for failure to so anticipate a later ruling.

Were it not for the fact that the direct appeal from the conviction was pending for seven (7) years before the Pennsylvania Supreme Court, due to continuances granted on application of the defendant, this case would have been "final" prior to the *Mapp* judgment on June 19, 1961.

H. Lester Haws, Esquire, trial counsel for Charles Edward Whiting, is now deceased. Therefore, there is no possible way of determining whether defense counsel ever discussed with the defendant the possibility of objection to the evidence. Furthermore, other questions arise. For example, is there any obligation on the part of defense counsel to discuss such questions as objection to evidence? What is the extent of the right and obligation of counsel to try a case in the manner in which he sees fit, rather than at the direction of his client?

The Pennsylvania Supreme Court and the United States Court of Appeals for several circuits have recognized and followed *Henry v. Mississippi*, as they interpret it. However in this case the United States Court of Appeals for the Third Circuit completely ignores this decision.

Conclusion

To determine the right of the Commonwealth of Pennsylvania to insist on compliance with its procedural rules, as well as the rights of Charles Edward Whiting; and to clarify the meaning and future application of the ruling of *Henry v. Mississippi* to innumerable cases, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15582

COMMONWEALTH OF PENNSYLVANIA *ex rel.*
CHARLES E. WHITING,

v.

A. C. CAVELL, Superintendent, State Correctional Institution at Rockview, Bellefonte, Pa.,
Appellant

No. 15623

COMMONWEALTH OF PENNSYLVANIA *ex rel.*
CHARLES E. WHITING,
Appellant

v.

A. C. CAVELL, Superintendent, State Correctional Institution at Rockview, Bellefonte, Pennsylvania,
Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued February 11, 1966
Before McLAUGHLIN, FORMAN and GANEY, *Circuit Judges*

OPINION OF THE COURT
(Filed March 3, 1966)

PER CURIAM.

Petitioner had been convicted in the Commonwealth of Pennsylvania, Montgomery County Common Pleas Court of murder and sentenced to life imprisonment. He is now serving that sentence. He filed an application for a writ of habeas corpus in the District Court. It is conceded that he has exhausted his state court remedies. His application stated that his home had been illegally searched and certain blood-stained clothing, allegedly his, had been illegally seized. That clothing was admitted in evidence at the state trial. Such action was rightly held to have been prejudicial by the District Judge. The latter also ruled that there was no evidence that Whiting "voluntarily surrendered his clothes with full knowledge of his rights." Finally, the District Judge from the uncontradicted evidence determined that the search as far as the clothes were concerned "was not incident to a lawful arrest" and that "There is nothing to show it was impracticable to obtain a search warrant." On the issue of search and seizure the Court granted the petition for the writ. Under the facts and the law we must affirm that decision.

There were other grounds urged on behalf of petitioner for the granting of the writ which were denied by the District Court. There is no need or use of passing upon these in view of our above stated conclusion.

The judgment of the District Court granting the petition for a writ of habeas corpus on the basis of illegal search and seizure will be affirmed.